

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

---

**IN RE: BLUE CROSS BLUE SHIELD  
ANTITRUST LITIGATION  
(MDL No. 2406)**

---

)  
)  
)  
) **Master File No. 2:13-CV-20000-RDP**  
)  
)

) This Document relates to Subscriber  
) Track cases.  
)  
)

**DEFENDANTS’ RESPONSE TO OBJECTOR HOME DEPOT’S  
SUBMISSION REGARDING SUBSCRIBERS’ MOTION  
FOR SUPPLEMENTAL NOTICE TO SELF-FUNDED ACCOUNTS**

Defendants submit this short response because Home Depot continues to misrepresent the Settling Parties’ position, the terms of the Settlement Agreement, the proposed short-form Supplemental Notice, and the law—all in an effort to deprive the Settlement Agreement of its bargained-for preclusive effect.<sup>1</sup>

*First*, neither the Supplemental Notice nor the Settling Parties “dodge[] the fundamental dispute over whether the (b)(2) release forbids an opt out from challenging the restrictions on Blue Bids for the limited purpose of obtaining additional bids for that opt out.” (1/18/22 Home Depot Br. 1.) The Settling Parties have been crystal clear that an Opt-Out can seek individualized monetary and injunctive relief, and “claims for additional Blue Bids are contemplated by the Settlement and, if warranted by the facts and circumstances of an individual case, would be divisible relief.” (12/17/21 Defs.’ Post-Hearing Reply Br. 16–17.)

---

<sup>1</sup> Defendants’ responses to the objections to the proposed Supplemental Notice filed by the Alaska Air Movants (D.E. 2887) and General Motors (D.E. 2889) are set out in prior briefing (*e.g.*, 11/12/21 Defs.’ Post-Hearing Brief in Support of Final Approval (D.E. 2869); 12/17/21 Defs.’ Post-Hearing Reply Brief in Support of Final Approval (D.E. 2881)), which is incorporated herein by reference.

**Second**, this does not mean, however, that an Opt-Out could obtain either a declaration that service areas are unlawful as to them, or an injunction enjoining the application of service areas as to them. An injunction or declaratory judgment that applies to a general corporate policy is just as much indivisible relief if it is entered in the context of a single claimant, or a class action. It is the nature of the remedy, not the procedural vehicle used to secure that remedy, that determines if the relief is indivisible or divisible. As the Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011), “The **key to the (b)(2) class** is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that ***the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.***” (Emphases added; internal quotation marks omitted.) And “[w]hen a claimant seeks a prohibitory injunction or a declaratory judgment with respect to a generally applicable policy or practice maintained by a defendant, those remedies—if afforded—generally stand to benefit or otherwise affect all persons subject to the disputed policy or practice, even if relief is nominally granted only as to the named claimant.” Principles of the Law of Aggregate Litigation § 2.04 cmt. a (Am. L. Inst. 2010); *see also Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972) (“[T]he fact is that one injunction is as effective as 100.”).

Of course, Home Depot knows this. But it argues to the contrary in an attempt to deprive the Settlement of its preclusive effect by seeking to rewrite the terms of the (b)(2) release (effectively turning it into an improper opt-out (b)(2) class), and effectively striking Paragraph 13, which expressly preserves service areas, from the Settlement Agreement.

**Third**, the proposed Supplemental Notice, particularly when coupled with the settlement record, is quite clear on what claims an Opt-Out can and cannot pursue, and equally clear that an Opt-Out remains subject to the (b)(2) release. Nothing more is needed. Home Depot’s request for

a bespoke determination of how the terms of the release and the provisions of the Settlement Agreement may impact the claims in a specific lawsuit is unwarranted. Such a determination is properly made only in the concrete factual and legal setting of that lawsuit.

*Finally*, for the reasons discussed above and in other briefing, the “modified” notice language contained in Subscriber Plaintiffs’ reply brief is inappropriate. If any supplemental notice is issued, it should be the notice attached to Subscriber Plaintiffs’ January 10, 2022 filing.

### **CONCLUSION**

For the reasons discussed above and in prior briefing, Defendants request that the Court overrule the oppositions to Subscribers’ Motion for Supplemental Notice to Self-Funded Accounts.

Dated: January 25, 2021

Respectfully submitted,

/s/ Daniel E. Laytin

David J. Zott, P.C.

Daniel E. Laytin, P.C.

Sarah J. Donnell

Christa C. Cottrell, P.C.

Zachary D. Holmstead

KIRKLAND & ELLIS LLP

300 North LaSalle

Chicago, IL 60654

Tel: (312) 862-2000

Fax: (312) 862-2200

david.zott@kirkland.com

daniel.laytin@kirkland.com

sarah.donnell@kirkland.com

christa.cottrell@kirkland.com

zachary.holmstead@kirkland.com

Kimberly R. West (Liaison Counsel)

Mark M. Hogewood

WALLACE, JORDAN, RATLIFF &  
BRANDT, LLC

First Commercial Bank Building

800 Shades Creek Parkway, Suite 400

Birmingham, AL 35209

Tel: (205) 870-0555  
Fax: (205) 871-7534  
kwest@wallacejordan.com  
mhogewood@wallacejordan.com

*Counsel for Defendant Blue Cross Blue  
Shield Association*

Craig A. Hoover  
E. Desmond Hogan  
Justin Bernick  
Peter Bisio  
Elizabeth Jose  
HOGAN LOVELLS US LLP  
Columbia Square  
555 13th Street, N.W.  
Washington, DC 20004  
Tel: (202) 637-5600  
Fax: (202) 637-5910  
craig.hoover@hoganlovells.com  
desmond.hogan@hoganlovells.com  
justin.bernick@hoganlovells.com  
peter.bisio@hoganlovells.com  
elizabeth.jose@hoganlovells.com

Evan R. Chesler  
Christine A. Varney  
Karin A. DeMasi  
Lauren R. Kennedy  
David H. Korn  
CRAVATH, SWAINE & MOORE LLP  
Worldwide Plaza  
825 Eighth Avenue  
New York, NY 10019  
Tel: (212) 474-1000  
Fax: (212) 474-3700  
echesler@cravath.com  
cvarney@cravath.com  
kdemasi@cravath.com  
lkennedy@cravath.com  
dkorn@cravath.com

*Counsel for Anthem, Inc., f/k/a WellPoint, Inc., and all of its named subsidiaries in this consolidated action; Louisiana Health Service & Indemnity Company (Blue Cross and Blue Shield of Louisiana); BCBSM, Inc. (Blue Cross and Blue Shield of Minnesota); Blue Cross and Blue Shield of South Carolina; Horizon Healthcare Services, Inc. (Horizon Blue Cross and Blue Shield of New Jersey); Blue Cross & Blue Shield of Rhode Island; Blue Cross and Blue Shield of Vermont; Cambia Health Solutions, Inc.; Regence Blue Shield of Idaho; Regence Blue Cross Blue Shield of Utah; Regence Blue Shield (of Washington); Regence Blue Cross Blue Shield of Oregon*

John D. Martin  
Lucile H. Cohen  
Travis A. Bustamante

*Coordinating Counsel for Defendant Blue Cross and Blue Shield Association; Counsel for Defendants Blue Cross and Blue Shield of Alabama; Blue Cross Blue Shield of Arizona; Blue Cross and Blue Shield of Florida, Inc.; Blue Cross and Blue Shield of Massachusetts, Inc.; Blue Cross and Blue Shield of North Carolina, Inc.; BlueCross BlueShield of Tennessee, Inc.; California Physicians' Service d/b/a Blue Shield of California; CareFirst, Inc.; CareFirst of Maryland, Inc.; Group Hospitalization and Medical Services, Inc.; CareFirst BlueChoice, Inc.; Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii); Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, including its divisions Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of*

NELSON MULLINS RILEY &  
SCARBOROUGH LLP  
1320 Main Street, 17th Floor  
Columbia, SC 29201  
Tel: (803) 255-9421  
Fax: (803) 256-7500  
john.martin@nelsonmullins.com  
lucie.cohen@nelsonmullins.com  
travis.bustamante@nelsonmullins.com

*Counsel for Anthem, Inc., f/k/a WellPoint, Inc., and all of its named subsidiaries in this consolidated action; Blue Cross and Blue Shield of North Carolina, Inc.; Louisiana Health Service & Indemnity Company (Blue Cross and Blue Shield of Louisiana); BCBSM, Inc. (Blue Cross and Blue Shield of Minnesota); Blue Cross and Blue Shield of South Carolina; Horizon Healthcare Services, Inc. (Horizon Blue Cross and Blue Shield of New Jersey); Blue Cross & Blue Shield of Rhode Island; Blue Cross and Blue Shield of Vermont; Cambia Health Solutions, Inc.; Regence Blue Shield of Idaho; Regence Blue Cross Blue Shield of Utah; Regence Blue Shield (of Washington); Regence Blue Cross Blue Shield of Oregon; Blue Cross & Blue Shield of Mississippi, a Mutual Insurance Company; Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa); Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii); Triple-S Salud, Inc.; Defendants Blue Cross and Blue Shield of Florida, Inc.; Blue Cross and Blue Shield of Massachusetts, Inc.; BlueCross BlueShield of Tennessee, Inc.*

Cavender C. Kimble  
BALCH & BINGHAM LLP  
1901 6th Avenue North, Suite 1500  
Birmingham, AL 35203-4642  
Tel: (205) 226-3437  
Fax: (205) 488-5860

*Texas, Blue Cross and Blue Shield of New Mexico, Blue Cross and Blue Shield of Oklahoma, and Blue Cross and Blue Shield of Montana; Caring for Montanans, Inc., f/k/a Blue Cross and Blue Shield of Montana, Inc.; Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa)*

Kimberly R. West (Liaison Counsel)  
Mark M. Hogewood  
WALLACE, JORDAN, RATLIFF &  
BRANDT, LLC  
First Commercial Bank Building  
800 Shades Creek Parkway, Suite 400  
Birmingham, AL 35209  
Tel: (205) 870-0555  
Fax: (205) 871-7534  
kwest@wallacejordan.com  
mhogewood@wallacejordan.com

*Counsel for Defendants Blue Cross Blue Shield Association; Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, including its divisions Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of Texas, Blue Cross and Blue Shield of New Mexico, Blue Cross and Blue Shield of Oklahoma, and Blue Cross and Blue Shield of Montana; Caring for Montanans, Inc., f/k/a Blue Cross and Blue Shield of Montana, Inc.; Highmark Inc., f/k/a Highmark Health Services; Highmark West Virginia Inc.; Highmark Blue Cross Blue Shield Delaware Inc.; California Physicians' Service d/b/a Blue Shield of California; Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa); Hawaii*

ckimble@balch.com

*Counsel for Anthem, Inc., f/k/a WellPoint, Inc., and all of its named subsidiaries in this consolidated action; Blue Cross and Blue Shield of North Carolina, Inc.; Louisiana Health Service & Indemnity Company (Blue Cross and Blue Shield of Louisiana); BCBSM, Inc. (Blue Cross and Blue Shield of Minnesota); Blue Cross and Blue Shield of South Carolina; Horizon Healthcare Services, Inc. (Horizon Blue Cross and Blue Shield of New Jersey); Blue Cross & Blue Shield of Rhode Island; Blue Cross and Blue Shield of Vermont; Cambia Health Solutions, Inc.; Regence Blue Shield of Idaho; Regence Blue Cross Blue Shield of Utah; Regence Blue Shield (of Washington); Regence Blue Cross Blue Shield of Oregon*

Gwendolyn Payton  
KILPATRICK TOWNSEND & STOCKTON  
LLP  
1420 Fifth Avenue, Suite 3700  
Seattle, WA 98101  
Tel: (206) 626-7714  
Fax: (206) 299-0414  
gpayton@kilpatricktownsend.com

*Counsel for Defendants Premera Blue Cross, d/b/a Premera Blue Cross Blue Shield of Alaska*

Brian K. Norman  
SHAMOUN & NORMAN, LLP  
1800 Valley View Lane, Suite 200  
Farmers Branch, TX 75234  
Tel: (214) 987-1745  
Fax: (214) 521-9033  
bkn@snlegal.com

H. James Koch  
ARMBRECHT JACKSON LLP  
RSA Tower, 27th Floor  
11 North Water Street

*Medical Service Association (Blue Cross and Blue Shield of Hawaii)*

James L. Priester  
Carl S. Burkhalter  
John Thomas A. Malatesta, III  
MAYNARD COOPER & GALE PC  
1901 6th Avenue North, Suite 2400  
Regions Harbert Plaza  
Birmingham, AL 35203  
Tel: (205) 254-1000  
Fax: (205) 254-1999  
jpriester@maynardcooper.com  
cburkhalter@maynardcooper.com  
jmalatesta@maynardcooper.com

Pamela B. Slate  
HILL CARTER FRANCO COLE &  
BLACK, P.C.  
425 South Perry Street  
Montgomery, AL 36104  
Tel: (334) 834-7600  
Fax: (334) 386-4381  
pslate@hillhillcarter.com

*With Cravath, Swaine & Moore LLP, counsel for Defendant Blue Cross Blue Shield of Alabama*

Helen E. Witt, P.C.  
Jeffrey J. Zeiger, P.C.  
KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, IL 60654  
Tel: (312) 862-2000  
Fax: (312) 862-2200  
hwitt@kirkland.com  
jzeiger@kirkland.com

*Counsel for Defendants Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, including its divisions Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of Texas, Blue Cross and Blue Shield of*



Mobile, AL 36602  
Tel: (251) 405-1300  
Fax: (251) 432-6843  
hjk@ajlaw.com

*Counsel for Defendants CareFirst, Inc.;  
CareFirst of Maryland, Inc.; Group  
Hospitalization and Medical Services, Inc.;  
CareFirst BlueChoice, Inc.*

R. David Kaufman  
M. Patrick McDowell  
BRUNINI, GRANTHAM, GROWER  
& HEWES, PLLC  
190 East Capitol Street  
The Pinnacle Building, Suite 100  
Jackson, MS 39201  
Tel: (601) 948-3101  
Fax: (601) 960-6902  
dkaufman@brunini.com  
pmcdowell@brunini.com

Cheri D. Green  
BLUE CROSS & BLUE SHIELD OF  
MISSISSIPPI, A MUTUAL INSURANCE  
COMPANY  
P.O. Box 1043  
Jackson, MS 39215  
Tel: (601) 932-3704  
cdgreen@bcbsms.com

*Counsel for Defendant Blue Cross & Blue  
Shield of Mississippi, a Mutual Insurance  
Company*

Michael A. Naranjo  
FOLEY & LARDNER LLP  
555 California Street, Suite 1700  
San Francisco, CA 94104  
Tel: (415) 984-9847  
Fax: (415) 434-4507  
mnaranjo@foley.com

Alan D. Rutenberg  
Benjamin R. Dryden  
FOLEY & LARDNER LLP

*New Mexico, Blue Cross and Blue  
Shield of Oklahoma, and Blue Cross and  
Blue Shield of Montana; Caring for  
Montanans, Inc., f/k/a Blue Cross and  
Blue Shield of Montana, Inc.; Highmark  
Inc., f/k/a Highmark Health Services;  
Highmark West Virginia Inc.; Highmark  
Blue Cross Blue Shield Delaware Inc.*

Jonathan M. Redgrave  
REDGRAVE, LLP  
14555 Avion Parkway, Suite 275  
Chantilly, VA 20151  
Tel: (703) 592-1155  
Fax: (612) 332-8915  
jredgrave@redgravellp.com

*Additional Counsel for HCSC and  
Highmark Defendants*

Todd M. Stenerson  
Brian C. Hauser  
Edmund Y. Saw  
SHEARMAN & STERLING LLP  
401 9th Street, N.W., Suite 800  
Washington, DC 20004  
Tel: (202) 508-8000  
Fax: (202) 508-8100  
todd.stenerson@shearman.com  
brian.hauser@shearman.com  
edmund.saw@shearman.com

Sarah L. Cylkowski  
Thomas J. Rheame, Jr.  
BODMAN PLC  
1901 Saint Antoine Street  
6th Floor at Ford Field  
Detroit, MI 48226  
Tel: (313) 259-7777  
Fax: (734) 930-2494  
scylkowski@bodmanlaw.com  
trheame@bodmanlaw.com

Andy P. Campbell  
A. Todd Campbell

3000 K Street, N.W., Suite 600  
Washington, DC 20007  
Tel: (202) 672-5300  
Fax: (202) 672-5399  
arutenberg@foley.com  
bdryden@foley.com

*Counsel for Defendant USABLE Mutual  
Insurance Company, d/b/a Arkansas Blue  
Cross and Blue Shield*

Robert K. Spotswood  
Michael T. Sansbury  
Joshua K. Payne  
Jess R. Nix  
Morgan B. Franz  
SPOTSWOOD SANSOM & SANSBURY  
LLC  
Financial Center  
505 20th Street North, Suite 700  
Birmingham, AL 35203  
Tel: (205) 986-3620  
Fax: (205) 986-3639  
rks@spotswoodllc.com  
msansbury@spotswoodllc.com  
jpayne@spotswoodllc.com  
jnix@spotswoodllc.com  
mfranz@spotswoodllc.com

*Counsel for Defendant Capital BlueCross*

Robert R. Riley, Jr.  
RILEY & JACKSON, P.C.  
3530 Independence Drive  
Birmingham, AL 35209  
Tel: (205) 879-5000  
Fax: (205) 879-5901  
rob@rileyjacksonlaw.com

*Counsel for Defendants Blue Cross and Blue  
Shield of Florida, Inc.; Blue Cross and Blue  
Shield of Massachusetts, Inc.; BlueCross  
BlueShield of Tennessee, Inc.*

Edward S. Bloomberg

Yawanna N. McDonald  
CAMPBELL PARTNERS LLC  
505 North 20th Street, Suite 1600  
Birmingham, AL 35203  
Tel: (205) 224-0750  
Fax: (205) 224-8622  
andy@campbellpartnerslaw.com  
todd@campbellpartnerslaw.com  
yawanna@campbellpartnerslaw.com

*Counsel for Defendant Blue Cross and  
Blue Shield of Michigan*

John Briggs  
Rachel Adcox  
Jeny M. Maier  
AXINN, VELTROP & HARKRIDER,  
LLP  
1901 L Street, N.W.  
Washington, DC 20036  
Tel: (202) 912-4700  
Fax: (202) 912-4701  
jbriggs@axinn.com  
radcox@axinn.com  
jmaier@axinn.com

Stephen A. Rowe  
Aaron G. McLeod  
ADAMS AND REESE LLP  
Regions Harbert Plaza  
1901 6th Avenue North, Suite 3000  
Birmingham, AL 35203  
Tel: (205) 250-5000  
Fax: (205) 250-5034  
steve.rowe@arlaw.com  
aaron.mcleod@arlaw.com

*Counsel for Defendant Independence  
Blue Cross*

Kathleen Taylor Sooy  
Tracy A. Roman  
Sarah Gilbert  
Honor Costello  
CROWELL & MORING LLP



John G. Schmidt Jr.  
Anna Mercado Clark  
PHILLIPS LYTLE LLP  
One Canalside  
125 Main Street  
Buffalo, NY 14203  
Tel: (716) 847-8400  
Fax: (716) 852-6100  
ebloomber@phillipslytle.com  
jschmidt@phillipslytle.com  
aclark@phillipslytle.com

Stephen A. Walsh  
WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL  
100 Corporate Parkway  
One Lake Level  
Birmingham, AL 35242  
Tel: (205) 572-4107  
Fax: (205) 572-4199  
swalsh@wwhgd.com

*Counsel for Defendant, Excellus Health Plan,  
Inc., d/b/a Excellus BlueCross BlueShield,  
incorrectly sued as Excellus BlueCross  
BlueShield of New York*

1001 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Tel: (202) 624-2500  
Fax: (202) 628-5116  
ksooy@crowell.com  
troman@crowell.com  
sgilbert@crowell.com  
hcostello@crowell.com

John M. Johnson  
Brian P. Kappel  
LIGHTFOOT FRANKLIN & WHITE  
LLC  
The Clark Building  
400 20th Street North  
Birmingham, AL 35203  
Tel: (205) 581-0700  
Fax: (205) 581-0799  
jjohnson@lightfootlaw.com  
bkappel@lightfootlaw.com

*Counsel for Defendants Blue Cross of  
Idaho Health Service, Inc.; Blue Cross  
and Blue Shield of Kansas, Inc.; Blue  
Cross and Blue Shield of Kansas City;  
Blue Cross and Blue Shield of  
Nebraska; Blue Cross Blue Shield of  
North Dakota; Blue Cross Blue Shield  
of Wyoming; Highmark Western and  
Northeastern New York Inc.*

David J. Zott, P.C.  
Daniel E. Laytin, P.C.  
KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, IL 60654  
Tel: (312) 862-2000  
Fax: (312) 862-2200  
david.zott@kirkland.com  
daniel.laytin@kirkland.com

*Counsel for Defendants Wellmark of  
South Dakota, Inc. (Wellmark Blue  
Cross and Blue Shield of South Dakota);  
Wellmark, Inc. (Wellmark Blue Cross  
and Blue Shield of Iowa); Hawaii*

*Medical Service Association (Blue  
Cross and Blue Shield of Hawaii);  
Triple-S Salud, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 25, 2021, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Daniel E. Laytin

Daniel E. Laytin